104

(2)

No. 08-51

FILED
AUG 0 8 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

TIMOTHY GREY,
Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, MANUEL VASQUEZ, CEDRIC PORTLEY, DAN CLAXTON, GARY HODGES, LUIS TAMEZ,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT THE DALLAS INDEPENDENT SCHOOL DISTRICT'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC V. MOYÉ *
VINCENT|MOYÉ, P.C.
2001 Bryan Street
Suite 2000
Dallas, Texas 75201
(214) 979-7400

* Counsel of Record

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED FOR REVIEW

Timothy K. Grey, ("hereinafter sometimes referred to as "Petitioner" or "Grey") submits the following seven questions which he suggests are worthy of this Court's consideration of this case and review:

1. . Does Grey's record raises [*sic*] a genuine fact issue as whether [*sic*] race was a motivating factor in his termination under Title VII Discrimination? [*sic*] and the grievance filed on February 15, 2002 and May 2, 2002 in the Dallas Independent School District Office of Employee Relation establish [*sic*] as to whether he engaged in a protected activity under Title VII Retaliation?

2. As a matter of law, did Grey engaged [*sic*] in a protected activity under Title VII Retaliation when he filed internal grievances on February 15, 2002, and May 2, 2002 in the Dallas Independent School District Office of Employee Relations.

3. Does Grey's [*sic*] as a School Resource Police Officer with the Dallas Independent School District under Section 1983—Fourteenth Amendment Liberty Interest have a protected liberty interest because he was an employee of a governmental employer who was publicly discharge [*sic*] under stigmatizing circumstances?

4. As a School Resource Police Officer with the Dallas Independent School District, under Section 1983 [*sic*] Denial of Property Interest, does Grey have a constitutional protected property interest in his expectation of continued employment when the Dallas Independent School

District policy abrogates its rights to terminate him without cause?

5. Was it an abuse of discretion to deny Grey [*sic*] motion to compel when the defendants withheld discoverable information that would have change [*sic*] the outcome and the only apparent justification was to adhere to a scheduling order that was improperly imposed when Grey was *pro se*?

6. Was it an abuse of discretion to grant Defendants' motion for protective orders when defendants failed to show good cause, and failed to provide the certification required by Rule 26 (c) Fed. R. Civ. P. and the only apparent justification was adherence to an improperly imposed scheduling order?

7. However, when Grey failed to respond to defendants [*sic*] summary judgment motions was caused by [*sic*] 1) improperly imposed scheduling orders, 2) Defendants' refusal to meet their discovery obligations, 3) erroneous rulings on discovery motions, 4) excusable neglect due to the inability of Grey's attorney to prepare the case in the available time, despite Grey's diligence, and the needed discovery would have produced evidence that would defeat summary judgment, should the judgment be vacated to prevent manifest injustice?

Rather, the Dallas Independent School District, (hereinafter sometimes referred to as "Respondent" or the "District") would respectfully show that these seven are not the proper questions to be addressed by this Court. Instead, the only proper questions

presented by this litigation in accordance with SUP. CT. R. 10 are as follows*:

1. Whether the Petitioner has presented any compelling reasons to grant the Petition, where the Fifth Circuit's decision (affirming the District Court's granting of the Dallas Independent School District's Motion for Summary Judgment as to Petitioner's Title VII discrimination claim) does not conflict with a decision of either this Court or another Court of Appeals.

2. Whether the Petitioner has presented any compelling reasons to grant the Petition, where the Fifth Circuit's decision (affirming the District Court's granting of the Dallas Independent School District's Motion for Summary Judgment as to Petitioner's retaliation claim) does not conflict with a decision of either this Court or another Court of Appeals.

3. Whether the Petitioner has presented any compelling reasons to grant the Petition, where the Fifth Circuit's decision (affirming the District Court's granting of the Dallas Independent School District's Motion for Summary Judgment as to Petitioner's Fourteenth Amendment Due Proc-

---

* Petitioner apparently raises issues pertaining only to claims that were brought against Respondent the Dallas Independent School District in his Petition for Writ of Certiorari. The Petition does not appear to raise any issues related to claims brought against the Individual Defendants below. Accordingly, this Response in Opposition addresses solely the issues as pertaining to the Dallas Independent School District.

ess claims for alleged violation of Petitioner's liberty and property interests) does not conflict with a decision of either this Court or another Court of Appeals.

4. Whether the Petitioner has presented any compelling reasons to grant the Petition, where the Fifth Circuit's decision (affirming the District Court's denial of Petitioner's Motion to Compel and granting of the Dallas Independent School District's Motion for Protective Order) does not conflict with a decision of either this Court or another Court of Appeals, and where Petitioner does not claim that the Fifth Circuit's ruling implicates an important federal question that has not been settled by this Court.

5. Whether the Petitioner has presented any compelling reasons to grant the Petition, where the Fifth Circuit's decision (affirming the District Court's denial of Petitioner's Motion to Vacate Judgment) does not conflict with a decision either of this Court or another Court of Appeals, and where Petitioner does not claim that the Fifth Circuit's ruling implicates an important federal question that has not been settled by this Court.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
INTERESTED PARTIES	v
TABLE OF AUTHORITIES	x
BRIEF IN OPPOSITION	1
OPINION BELOW	2
A. Proceedings in the District Court	2
B. Proceedings from the Court of Appeals	4
JURISDICTION	7
STATUTORY AND OTHER PROVISIONS INVOLVED	7
STATEMENT OF THE CASE	8
REASONS FOR DENYING THE WRIT	10
A. The District Court properly granted Respondent's Motion for Summary Judgment	11
1. Petitioner failed to establish that the Fifth Circuit's Opinion affirming the District Court's granting of Respondent's Motion for Summary Judgment conflicts with decisions of this Court or another Court of Appeals	11
2. Petitioner failed to establish that the Fifth Circuit's Opinion affirming the District Court's granting of Respondent's Motion for Summary Judgment on Petitioner's Title VII discrimination claim conflicts with decisions of this Court or another Court of Appeals	14

TABLE OF CONTENTS—Continued

Page

3. Petitioner failed to establish that the Fifth Circuit's Opinion affirming the District Court's granting of Respondent's Motion for Summary Judgment on Petitioner's Title VII retaliation claim conflicts with decisions of this Court or another Court of Appeals 16

4. Petitioner failed to establish that the Fifth Circuit's Opinion affirming the District Court's granting of Respondent's Motion for Summary Judgment on Petitioner's Fourteenth Amendment Due Process claims for alleged violation of Petitioner's liberty and property interests conflicts with decisions of this Court or of another Court of Appeals 18

a. Liberty Interest 18

b. Property Interest 20

B. The District Court properly ruled on the discovery motions 21

1. The District Court's rulings on the discovery motions are reviewed for abuse of discretion 21

2. The Fifth Circuit properly held that the District Court did not abuse its discretion 21

C. The District Court properly denied Petitioner's Motion to Vacate 24

TABLE OF CONTENTS—Continued

Page

1. The denial of Petitioner's Motion to Vacate is reviewed for abuse of discretion 24

2. Petitioner provides no basis for reconsideration 24

CONCLUSION 26

APPENDIX A—Copy of the District Court's Unpublished Memorandum Opinion and Order dated December 30, 2005 ..... 1a

APPENDIX B—Copy of the Fifth Circuit's Unpublished *Per Curiam* Opinion dated February 14, 2008 ..... 14a

APPENDIX C—Copy of the Fifth Circuit's Order Denying Petition for Rehearing 26a

TABLE OF AUTHORITIES

FEDERAL STATUTES — Page

28 U.S.C. § 1254(1) 7
42 U.S.C. § 1983 ..... 8, 20
42 U.S.C. § 2000(e) *et. seq.* 8

FEDERAL CASES

Abromitis v. Cont'l Cas. Co./CNA Ins. Co., No. 03-2425, 2004 U.S. App. LEXIS 23310 (4th Cir. Nov. 5, 2004) 21
Amnesty Am. v. Town of W. Hartford, 288 F.3d 467 (2d Cir. 2002) 13
Audi AG v. D'Amato, 469 F.3d 534 (6th Cir. 2006) 23
Aziz v. Groose, No. 95-2496, 1996 U.S. App. LEXIS 402 (8th Cir. Jan. 12, 1996). 21
Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570 (5th Cir. 2003) 16
Bennett v. Dr Pepper/Seven Up, Inc., 295 F.3d 805 (8th Cir. 2002) 13
Bishop v. Wood, 426 U.S.341, 96 S. Ct. 2074 (1976) 20, 21
Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972) 19, 20
Casey v. Albertson's, Inc., 362 F.3d 1254 (9th Cir. 2004) 24
Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) 12, 13
Draper v. Coombs, 792 F.2d 915 (9th Cir. 1986) 23
Enwonwu v. Fulton-DeKalb Hosp. Auth., No. 07-13498, 2008 U.S. App. LEXIS 10372 (11th Cir. May 12, 2008) 21
Firestone v. Firestone, 76 F.3d 1205 (D.C. Cir. 1996) 25

TABLE OF AUTHORITIES—Continued

Page

Ford Motor Credit Co. v. Bright, 34 F.3d 322 (5th Cir. 1994) 24

Grady v. Affiliated Cent., Inc., 130 F.3d 553 (2d Cir. 1997) 23

Guarino v. Brookfield Township Trustees, 980 F.2d 399 (6th Cir. 1992) 13

Jones v. Sheehan, Young & Culp, P.C., 82 F.3d 1334 (5th Cir. 1996) 12, 13

Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155 (1974) 18, 19

Kafele v. Lerner, Sampson, Rothfuss, L.P.A., No. 04-3659, 2005 U.S. App. LEXIS 28680 (6th Cir. Dec. 22, 2005) 25

Kessee v. Oklahoma, No. 94-6291, 1995 U.S. App. LEXIS 9948 (10th Cir. May 2, 1995) 21

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) 14

Muncy v. City of Dallas, 335 F.3d 394 (5th Cir. 2003) 20

Richmond v. Oklahoma Univ. Bd. of Regents, No. 97-5181, 1998 U.S. App. LEXIS 26600 (10th Cir. Oct. 20,1998) 17

Shaheen v. Naughton, No. 05-6550-cv, 2007 U.S. App. LEXIS 3978 (2d Cir. Feb. 21, 2007) 23

Schwartz v. Emhart Glass Machinery, Inc., No. 07-55284, 2007 U.S. App. LEXIS 18355 (9th Cir. July 27, 2007) 24

Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789 (1991) 18, 19

S/N Precision Enters. v. AxsysTechs, Inc., No. 07-0315-CV, 2008 U.S. App. LEXIS 11309 (2d Cir. May 27, 2008) 21

TABLE OF AUTHORITIES—Continued

Page

St. Mary's Honor Ctr., v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993) 14, 15

In re Subpoena to Michael Witzel, No. 07-2286, 2008 U.S. App. LEXIS 14470 (1st Cir. July 7, 2008) 21

Turnage v. Gen. Elec. Co., 953 F.2d 206 (5th Cir. 1992) 23

Ullman v. Ohio Bureau of Empl. Servs., No. 98-3390, 1999 U.S. App. LEXIS 32226 (6th Cir. Dec. 3, 1999) 16, 17, 18

UNITED STATES DISTRICT COURT CASE(S)

Bookman v. Shubzda, 945 F. Supp. 999 (N.D. Tex. 1999) 11

FEDERAL RULES

FED. R. CIV. P. 16(b) 22

FED. R. CIV. P. 59(e) 9, 24, 25

FED. R. APP. P. 40(a)(1) 7

MISCELLANEOUS

SUP. CT. R. 10 ..... iii, 1, 7, 10

SUP. CT. R. 14.4 10

N.D. TEX. L.R. 16(b) 22

IN THE

Supreme Court of the United States

No. 08-51

TIMOTHY GREY,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, MANUEL VASQUEZ, CEDRIC PORTLEY, DAN CLAXTON, GARY HODGES, LUIS TAMEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT THE DALLAS INDEPENDENT SCHOOL DISTRICT'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COMES NOW the Dallas Independent School District, Respondent herein, and files this its Opposition to Petition for Writ of Certiorari filed by Timothy Grey. This Brief is filed in accordance with SUP. CT. R. 10. By its opposition, Respondent respectfully prays that this Court deny the instant Petition for the issuance of a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered on February 14, 2008.

OPINION BELOW

A. Proceedings in the District Court

Petitioner filed his Original Complaint in this matter *pro se*,[1] on May 28, 2004. Contemporaneously therewith, Petitioner filed his Motion for Leave to Proceed *In Forma Pauperis*, which was granted on July 19, 2004. On August 17, 2004, Respondent filed its Original Answer, denying all material allegations and interposing various affirmative defenses. On that same day, Respondent filed a Motion for Partial Judgment on the Pleadings.

Petitioner filed his Amended Complaint and Jury Demand ("Complaint") on March 31, 2005, asserting race discrimination and retaliation claims pursuant to Title VII, alleging violations of 42 U.S.C. § 1983, 42 U.S.C § 1985, as well as the First and Fourteenth Amendments to the U.S. Constitution. Petitioner also successfully invoked the supplemental jurisdiction of the District Court over a number of state law claims including breach of contract, conspiracy, intentional interference with contract, and defamation.

On April 11, 2005, Respondent filed its Answer to Petitioner's Amended Complaint, denying all material allegations and interposing various affirmative defenses.

---

[1] Contrary to his consistent representations to the District Court and the Court of Appeals, Petitioner was assisted by duly licensed counsel through virtually every material stage in this matter. Indeed, Petitioner admitted in his deposition that he was assisted throughout the course of this case by counsel in the preparation of numerous pleadings, in the drafting of discovery and the preparation for his deposition. That counsel may not appear on current pleadings in this matter pursuant to an Order of the Disciplinary Committee of the State Bar of Texas.

On May 11, 2005, Respondent filed its Second Motion for Partial Judgment on the Pleadings.

On June 9, 2005, Petitioner was deposed. John D. Copeland, Petitioner's counsel during this matter, appeared with the Petitioner for said deposition; however, because Mr. Copeland had not previously entered an appearance on behalf of Petitioner, the District Court prohibited Mr. Copeland's participation until after he appeared of record. More than two months later, on August 25, 2005, Mr. Copeland filed a Notice of Appearance on behalf of Petitioner, four days before the close of discovery, as mandated by the Court's Scheduling Order.

Two days later, on August 26, 2005, Petitioner noticed a number of depositions and otherwise sought discovery from the Respondent. On that very same day, Respondent filed its Motion for Protective Order seeking relief from these discovery requests. On August 31, 2005, the Court-imposed discovery deadline, Petitioner filed a Motion to Compel Responses to Plaintiff's Interrogatories and Requests for Production. On September 19, 2005, Respondent filed its Response to Petitioner's Motion to Compel.

On October 27, 2005, Respondent filed its Motion for Summary Judgment and Brief in Support thereof. On that same date, Respondent's Appendix in Support of its Motion for Summary Judgment was also filed. Pursuant to Northern District of Texas Local Rule 7.1(e), Petitioner's Response to Respondent's Motion was due on November 16, 2005. Petitioner filed no Response in opposition to the Motion whatsoever, nor did he seek leave to extend his deadline to respond.

On December 30, 2005, the District Court denied Petitioner's Motion to Compel and granted Respondent's Motion for Protective Order.

Also on December 30, 2005 (and approximately seven weeks after Petitioner's Response should have been filed), the District Court entered a Memorandum Opinion and Order granting Respondent's Motion for Summary Judgment. (A copy of the Unpublished Memorandum Opinion and Order is attached hereto as Appendix A.) Contemporaneously, the District Court rendered its Judgment that Petitioner take nothing by his suit and dismissed Petitioner's claims with prejudice.

On January 17, 2006, Petitioner (by and through his counsel) filed his Motion to Vacate the Court's Judgment and Supporting Brief. On that same date, Petitioner also filed his Affidavit in Support thereof, as well as the Declarations of two individuals, William Perry and Sophia Graham.

On January 31, 2006, Respondent filed its Response to Petitioner's Motion as well as objections to the evidence attached thereto. On June 14, 2006, the District Court denied Petitioner's Motion to Vacate Judgment.

B. Proceedings from the Court of Appeals

On July 10, 2006, Petitioner filed a Notice of Appeal of the District Court's June 16, 2006 Order denying Petitioner's Motion to Vacate, and also appealed the Court's December 30, 2005 Memorandum Opinion and Order granting Respondent's Motion for Summary Judgment.

On October 6, 2006, the Fifth Circuit Court of Appeals issued a briefing notice in this matter

pursuant to which Petitioner's Brief was due to be filed on November 15, 2006. On November 14, 2006 (the day before the deadline for filing of his Brief), Petitioner filed a Motion to Stay and to Extend Time purportedly for the purpose of presenting a Motion for Relief from Judgment to the District Court pursuant to FED. R. CIV. P. 60(b).

On November 20, 2006, the Fifth Circuit granted in part Petitioner's Motion to Stay pending resolution of the Motion for Relief. The Fifth Circuit directed that the appellate proceedings would be stayed until the later of December 31, 2006 or the date on which the District Court ruled on the Motion for Relief.

On January 4, 2007, Petitioner finally filed his Motion for Relief with the District Court. Thereafter, on January 24, 2007, Respondent filed its Response thereto. On February 25, 2007, the District Court denied Petitioner's Motion for Relief from Judgment.

On March 14, 2007, the Fifth Circuit issued a notice resuming the briefing schedule. Pursuant to this notice, Petitioner's Brief was due on April 13, 2007. On April 16, 2007, Petitioner filed his Motion to Extend Time for the filing of Petitioner's Brief until April 20, 2007. On April 20, 2007, the Fifth Circuit granted Petitioner's Motion and extended the deadline for the filing of Petitioner's Brief to April 20, 2007, the deadline chosen and requested by Petitioner.

On May 3, 2007, almost two full weeks **after** the expiration of the April 20, 2007 deadline for the filing of Petitioner's Brief, the Fifth Circuit *sua sponte* dismissed the instant appeal pursuant to Fifth Circuit Rule 42 because of Petitioner's failure to timely file his Brief.

On July 11, 2007, more than two months after the Fifth Circuit dismissed the instant appeal, Petitioner filed his third Motion to Extend Time to File Petitioner's Brief. Contemporaneously therewith, Petitioner transmitted his Petitioner's Brief for filing.

On July 17, 2007, the Fifth Circuit's Clerk entered an Order denying Petitioner's motion to reinstate the appeal.

On July 30, 2007, Petitioner filed a Motion for Reconsideration of the Clerk's Order Denying the Motion to Reinstate the case.

On August 17, 2007, this Court granted Petitioner's Motion for Reconsideration and reopened the instant appeal. Also on August 17, 2007, the Clerk of the Fifth Circuit filed Petitioner's Brief in this matter.

On November 2, 2007, Petitioner filed a Motion for Leave to File Corrected Brief and on the same date, filed Petitioner's Corrected Brief.

On February 14, 2008, the Fifth Circuit rendered a *per curiam* Opinion and Memorandum affirming the opinion and order of the District Court granting Respondent's Motion for Summary Judgment. (A copy of the Unpublished *Per Curiam* Opinion and Memorandum is attached hereto as Appendix B.) Contemporaneously therewith, the Fifth Circuit rendered judgment affirming the District Court and further ordered Petitioner to pay Respondent's costs on appeal.

On February 28, 2008, Petitioner filed a Petition for Panel Rehearing. On March 18, 2008, the Fifth Circuit denied the Petition for Rehearing as the Petition was not filed in a timely manner in accord

with FED. R. APP. P. 40(a)(1). (A copy of the Order is attached hereto as Appendix C.)

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

Respondent respectfully directs this Court to SUP. CT. R. 10, "Considerations Governing Review on Certiorari," which provides as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state

court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATEMENT OF THE CASE

Former District employee Timothy Grey filed claims against the Dallas Independent School District and five of its employees, Manuel Vasquez, Cedric Portley, Dan Claxton, Gary Hodges, and Luis Tamez, individually, pursuant to 42 U.S.C. §1983 ("Section 1983") and 42 U.S.C. §§2000(e) *et. seq.* ("Title VII"), alleging unlawful employment practices on the basis of race and color.

Petitioner subsequently filed an Amended Complaint in which he again asserted claims pursuant to Section 1983 and Title VII, alleging unlawful practices on the basis of race. Petitioner also advanced allegations of retaliation, conspiracy, denial of due process, breach of contract by the Respondent and intentional interference with contract on the part of the individual Defendants. Finally, Petitioner asserted that he had been defamed by Defendant Manuel Vasquez. Specifically, Petitioner alleged that Respondent has an "unwritten official policy" of denying Black employees' grievances while granting White employees' grievances. Petitioner also alleged that Respondent discriminated against him on the basis of his race by denying his grievance rights because he is African-American and disciplining

him more harshly than similarly situated White employees.

Petitioner further claimed that the Respondent retaliated against him by taking him off patrol duties and assigning him to the headquarters building, filing written internal complaints against him, placing him under investigation for illegitimate reasons, taking away his police credentials, and refusing to follow its appropriate grievance procedures.

The District Court properly granted Respondent's Motion for Summary Judgment for a number of reasons. Primarily as a result of Petitioner's failure to file a response to Respondent's Motion or to otherwise proffer any controverting summary judgment evidence whatsoever, Petitioner could not satisfy his evidentiary burdens related to establishing the claims on which he brought suit. Additionally, Respondent established that each of Petitioner's claims failed as a matter of law. Moreover, most of Petitioner's claims were barred by limitations.

The District Court also did not abuse its discretion in denying Petitioner's Motion to Compel further discovery responses because Respondent's previous discovery responses were both responsive and comprehensive. Moreover, the District Court did not abuse its discretion in granting Respondent's Motion for Protective Order considering Petitioner's last-minute deposition notices were served literally on the eve of the expiration of the discovery period.

Finally, the District Court did not abuse its discretion in denying Petitioner's Motion to Vacate because the affidavit and declaration testimony he sought to introduce into evidence before the District Court was not "newly discovered" under any interpretation as required pursuant to FED. R. CIV. P. 59(e).

REASONS FOR DENYING THE WRIT

A writ of certiorari should be granted only in the face of compelling reasons. SUP. CT. R. 10. Nonetheless, Petitioner fails to provide this Court with any compelling reasons to grant the Petition. Even a cursory review of the Petition reveals that it is nothing more than Petitioner's personal disagreements with the District Court and the Fifth Circuit's decisions. The instant effort before this Court is Petitioner's latest improper attempt to re-litigate Petitioner's unfounded claims in yet another forum.

Furthermore, a petitioner's failure to "present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny the Petition." SUP. CT. R. 14.4. The Petition in this case completely lacks the required accuracy, brevity and clarity of the points Petitioner requests this Court to consider. Instead, the Petition is practically a verbatim rehashing of the pleadings he presented to the District Court and to the Court of Appeals.

Most substantively, the decisions of the Fifth Circuit to leave undisturbed the rulings of the District Court do not conflict with any decision of this Court or another United States Court of Appeals, nor do they depart so far from the accepted and usual course of judicial proceedings so as to warrant this Court's exercise of its supervisory power. Additionally, the decisions do not implicate an important federal question in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10. Petitioner fails to provide opinions either of this Court or any other court of appeals which conflict with the decisions below. Petitioner also fails to show (or even

to allege) that the decisions of the District Court and the Fifth Circuit's affirmation of same depart from the accepted and usual course of judicial proceedings. For each of these reasons, the Petition should be denied. There is simply nothing in this case worthy of the time or consideration of this Court.

A. The District Court properly granted Respondent's Motion for Summary Judgment.

1. *Petitioner failed to establish that the Fifth Circuit's Opinion affirming the District Court's granting of Respondent's Motion for Summary Judgment conflicts with decisions of this Court or another Court of Appeals.*

Petitioner contends that his Petition should be granted because the District Court erred in granting Respondent's Motion for Summary Judgment against Petitioner on his Title VII discrimination claim. At the outset, it is important to note that Petitioner makes this contention despite the fact that Petitioner wholly failed to deliver to the trial court ***any evidence*** to support opposition to the Motion. Indeed, Petitioner failed to make any response to the Motion for Summary Judgment whatsoever. Thusly, Petitioner completely and without excuse failed to support his Title VII discrimination claim in the District Court. While it is true that a *pro se* litigant's response to a summary judgment motion should be construed liberally, it does not excuse this litigant, as the party bearing the burden of proof, from setting forth specific facts supporting his claims. *Bookman v. Shubzda*, 945 F. Supp. 999, 1004 (N.D. Tex. 1999) (citing *Jones v. Sheehan, Young, & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996)).

The District Court noted that Petitioner, while he responded to Respondents' two Motions to Dismiss, completely failed to respond to Respondents' Motions for Summary Judgment. Accordingly, the District Court found that Petitioner failed to come forward with any summary judgment evidence supporting his claims or refuting the defenses as raised by the Respondent.

Of course, the Fifth Circuit had no choice but to affirm, holding that summary judgment was appropriate because Petitioner did not carry his burden to "designate specific facts showing that there is a genuine issue for trial." Appendix B, pp. 19a-20a.

This Court has previously addressed this issue of a district court's granting of a motion for summary judgment where a nonmovant fails to file a response or any evidence. This Court has held, where [as here] a nonmovant for summary judgment bears the burden of proof at trial, that nonmovant must respond to the motion for summary judgment by going beyond the pleadings and by his own affidavits, depositions or answers to discovery designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324; 106 S. Ct. 2548, 2553 (1986). Ignoring this self-evident proposition, the Petitioner failed to do anything whatsoever in response. As the responding party to the Motion for Summary Judgment, Petitioner bears the burden of proof on his claims. Not only did Petitioner fail to provide **any** evidence, Petitioner did not even bother to file a response.

Not surprisingly, there is uniformity among the Circuit Courts on this issue. The Fifth Circuit has expressly held that district courts are under no obligation to "search the record" for evidence to

support the nonmovant's case. *Jones*, 82 F.3d at 1338 n.3. At least three other circuits agree. The Second Circuit, in *Amnesty America v. Town of West Hartford*, 288 F.3d 467 (2d Cir. 2002), held that it agreed with other circuit courts that hold that district courts are under no obligation to perform an independent review of the record to find a factual dispute. *Id.* at 470. The Sixth Circuit, in *Guarino v. Brookfield Township Trustees,* 980 F.2d 399 (6th Cir. 1992), specifically rejected the notion that the trial court should make its own investigation of the record and emphasized the importance of requiring a litigant to file a response. *Id.* at 405. The Eighth Circuit likewise has held that counsel-free status does not entitle the *pro se* litigant to disregard the Federal Rules of Civil Procedure by failing to file a response to a summary judgment motion. *Bennett v. Dr Pepper/Seven Up, Inc.*, 295 F.3d 805, 808 (8th Cir. 2002). Thus, the decisions below are consistent with those of this Court and other courts of appeals.

Throughout the Petition, the Petitioner characterizes facts alleged in his pleadings as "evidence" and urges this Court to grant Petition based on the "evidence." However, following this Court's previous holding in *Celotex,* the Petitioner, as nonmovant, needed to go *beyond* the pleadings and identify in the record specific facts establishing genuine issues for trial, which Petitioner utterly failed to do. *See Celotex*, 477 U.S. at 324. Accordingly, the District Court applied the proper summary judgment standard and correctly granted Respondent's Motion for Summary Judgment. Petitioner does not provide any compelling reasons why the Petition should be granted in this regard.

2. *Petitioner failed to establish that the Fifth Circuit's Opinion affirming the District Court's granting of Respondent's Motion for Summary Judgment on Petitioner's Title VII discrimination claim conflicts with decisions of this Court or another Court of Appeals.*

The District Court properly granted Respondent's Motion for Summary Judgment because Petitioner failed to establish a *prima facie* case of Title VII race discrimination. The District Court held that even if Petitioner had been able to establish such a *prima facie* case, Respondent rebutted any presumption of discrimination by offering legitimate non-discriminatory reasons for terminating Petitioner's employment. Again, the Fifth Circuit's opinion affirming the District Court is entirely consistent with precedent set by this Court and followed in other circuits. Petitioner fails to show that this opinion conflicts with decisions of any other Court of Appeals. Petitioner does not provide any other compelling reason to grant the Petition as to his Title VII discrimination claim.

This Court has held in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802; 93 S. Ct. 1817, 1824 (1973), that to establish a *prima facie* case of discrimination, the plaintiff must establish by a preponderance of the evidence that (1) he is a member of a protected class; (2) he qualified for the position held; (3) he was subject to an adverse employment action; and (4) the position remained open and was filled by a person in another race. *Id. See also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506; 113 S. Ct. 2742, 2747 (1993).

In the instant case, Petitioner failed to provide any evidence whatsoever to support his Title VII claim for discrimination. Therefore, the District Court properly held that Petitioner failed to establish a *prima facie* case of discrimination. Petitioner does not challenge or even attempt to address the District Court's ruling that Petitioner failed to establish a *prima facie* case of discrimination. Instead, Petitioner merely asserts that the District Court erred in its ruling on his Title VII discrimination claim because the two grievances Petitioner filed against Respondent somehow proved his allegation of intentional discrimination. This is the same unsupported argument Petitioner made below, which was rejected each time proffered.

On their face, Petitioner's arguments are simply frivolous. For example, Petitioner argues that "[s]ince petitioner was a young, black, male, **it is reasonable to assume** that his complaint was race discrimination, but it matters not what kind of discrimination he complained of, it only matters that he complained of discrimination within the ambit of the EEOC." *See* Petition for Writ of Certiorari, p. 24 (emphasis added). This argument does not even approach the standard for establishing a Title VII discrimination claim as held by this Court. Moreover, this Court has expressly provided that it has "no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate fact finder determines, according to proper procedures, *that the employer has unlawfully discriminated*." *St. Mary's Honor Ctr.*, 509 U.S. at 514. In this case, the District Court, through its analysis, determined that Petitioner failed to establish that Respondent unlawfully discriminated. Thus, Petitioner's attempt to request this Court to

hold Respondent liable for unlawful discrimination via a writ of certiorari is improper.

Additionally, the District Court held that even it had somehow found that Petitioner did establish a *prima facie* case of discrimination under Title VII, Respondents provided ample evidence of legitimate, non-discriminatory reasons for the adverse employment action, which Petitioner failed or even attempted to show were pretext. Thus, the District Court properly granted summary judgment, and the Fifth Circuit properly affirmed that decision. These opinions below are consistent with previous decisions of this Court. Tellingly, Petitioner does not cite a single opinion of other courts of appeals that conflicts, and thus, Petitioner fails to provide any compelling reasons why this Court should reconsider.

3. *Petitioner failed to establish that the Fifth Circuit's Opinion affirming the District Court's granting of Respondent's Motion for Summary Judgment on Petitioner's Title VII retaliation claim conflicts with decisions of this Court or another Court of Appeals.*

It is well settled throughout the United States Courts of Appeals that to establish a claim for Title VII retaliation, a plaintiff must make a *prima facie* case by showing that (1) he engaged in a protected activity under Title VII, (2) an adverse employment action occurred, and (3) there was a causal link that existed between the protected activity and the adverse action. *Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 757 (5th Cir. 2003); *see also, e.g., Ullman v. Ohio Bureau of Empl. Servs.*, No. 98-3390, 1999 U.S. App. LEXIS 32226, *15-16 (6th Cir. Dec. 3,

1999), *Richmond v. Oklahoma Univ. Bd. of Regents,* No. 97-5181, 1998 U.S. App. LEXIS 26600, *5 (10th Cir. Oct. 20, 1998). In this case, the District Court held that Petitioner failed to establish a *prima facie* case of Title VII retaliation because he did not prove that he engaged in a protected activity.

Petitioner argues that he engaged in a protected activity (1) when he stated to his superiors that, if they wanted to talk [about his suspended drivers license], they needed to talk to his attorney, and (2) when he filed a grievance against his employer. The District Court and the Fifth Circuit both held that Petitioner failed to prove that these two alleged activities are protected under Title VII. The Fifth Circuit pointed out that his grievance did not mention race or any other allegation of discrimination violative of Title VII. Petitioner, in a desperate attempt to show that the grievance was a protected activity under Title VII, points out that the grievance stated that other officers who were insubordinate and disrespectful were not disciplined. As this response also falls far short of the standard clearly established, the Fifth Circuit correctly found that Petitioner did not demonstrate that he engaged in a protected activity under Title VII.

The Fifth Circuit's opinion is consistent with at least one other court of appeals. In *Ullman v. Ohio Bureau of Employment Services*, No. 98-3390, 1999 U.S. App. LEXIS 32226, *15-16 (6th Cir. 1999), the Sixth Circuit found that protected activity under Title VII was not established where a terminated employee filed a charge against her employer complaining of the discharge or discipline of fellow employees for alleged civil rights violations. *Id.* at 16 n.6. The Sixth Circuit held that "none of the claims

involved opposition to Title VII violations and thus did not constitute protected activity." *Id. at* *16. As in the *Ullman* case, Petitioner also complains that the grievances he filed against Respondent, although the grievance does not even mention any activities that fall under the protection of Title VII, constituted protected activity. However, Petitioner's claims do not involve "opposition to Title VII violations" and do not constitute protected activity. *See id.* The Fifth Circuit properly held that Petitioner failed to establish that he engaged in any protected activity. Fatally, Petitioner fails to provide any decisions of this Court or another court of appeals to the contrary.

4. Petitioner failed to establish that the Fifth Circuit's Opinion affirming the District Court's granting of Respondent's Motion for Summary Judgment on Petitioner's Fourteenth Amendment Due Process claims for alleged violation of Petitioner's liberty and property interests conflicts with decisions of this Court or of another Court of Appeals.

a. Liberty Interest

Without a scintilla of factual support, Petitioner asserted that he had liberty and property interests that were violated by the Respondent. To the contrary, the District Court correctly ruled that Petitioner does not have a protected liberty interest in his reputation or good name. The District Court, in making this decision, relied on well-settled precedent established by this Court. Its decision was based on *Siegert v. Gilley*, 500 U.S. 226; 111 S. Ct. 1789; 114 L. Ed. 2d 277 (1991) and *Paul v. Davis*, 424 U.S. 693; 96 S. Ct. 1155; 47 L. Ed. 2d 405 (1976). In

these cases, this Court expressly held that injury to reputation or name is not a constitutionally-protected liberty interest. *Id.* Accordingly, the District Court and the Fifth Circuit's opinions were entirely consistent with the opinions of this Court.

Here, Petitioner argues that he is not asserting his Fourteenth Amendment claim on the basis of mere damage to his reputation, but rather on the basis that he was a public employee who was discharged on false charges, directing this Court to *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), in support of this argument. *Roth* stands for the proposition that a public employee has a protected liberty interest that is violated **if he shows that the governmental employer discharged him on false charges that might seriously damage his standing and association in his community or impose a stigma or other disability.** *Id.* (emphasis added).

Petitioner's argument is without merit for several reasons. First, Petitioner did not even **attempt** to establish that he was discharged based upon on false charges. Indeed, Petitioner himself acknowledges that the grounds for his termination were (1) insubordination, (2) refusal to comply with policies, (3) conduct causing loss of confidence in the District, (4) failure to meet acceptable standards of conduct, and (5) tardiness or excessive absences. He does not refute these bases for termination or otherwise declare their falsity. The record is clear. Petitioner does not deny these charges but only asserts that they are stigmatizing and that he is unable to get a job elsewhere as a consequence. The District Court and Fifth Circuit found that the District's

grounds were supported by more than sufficient evidence. Petitioner completely failed to produce any evidence to the contrary. Petitioner also failed to provide any evidence that these charges caused serious damage to his standing and association in the community or imposed a stigma. Accordingly, *Roth* is inapplicable to the facts of this case, and Petitioner failed to show that he was discharged under false charges.

b. Property Interest

This Court has held that a Fourteenth Amendment property interest *may* arise in one's employment, however, the "sufficiency of the claim of entitlement must be decided by reference to state law." *Bishop v. Wood*, 426 U.S. 341, 344; 96 S. Ct. 2074, 2077; 48 L. Ed. 2d 684, 690 (1976). Under Texas law, there is a presumption that employment is at-will and does not create a property interest in employment unless that relationship has been expressly altered in one of two ways: (1) by contract, or (2) by express rules or policies limiting the conditions under which an employee may be terminated. *Muncy v. City of Dallas*, 335 F.3d 394, 398 (5th Cir. 2003).

The District Court held that Petitioner failed to demonstrate a Fourteenth Amendment protected property interest in his employment pursuant to section 1983 because although he alleged in his complaint that he was employed pursuant to a written employment contract, he failed to produce the contract or any evidence of the existence of the contract. By contrast, the Respondent produced evidence that Petitioner, as support staff, did not have a written contract, but was an at-will employee. Accordingly, the Fifth Circuit properly affirmed the

District Court's decision that Petitioner, as an at-will employee, did not have a property interest in his employment. This decision is entirely consistent with previous decisions of this Court, *see e.g., Bishop*, 426 U.S. 345-47, and Petitioner fails to provide this Court with any other compelling reasons as to why Petition should be granted in this case.

B. The District Court properly ruled on the discovery motions.

1. *The District Court's rulings on the discovery motions are reviewed for abuse of discretion.*

Petitioner next asserts that the District Court erred in ruling on discovery motions. Appellate courts review a district court's rulings on discovery motions for abuse of discretion. *See e.g., In re Subpoena to Michael Witzel*, No. 07-2286, 2008 U.S. App. LEXIS 14470, *10-11 (1st Cir. July 7, 2008); *S/N Precision Enters. v. AxsysTechs, Inc.*, No. 07-0315-CV, 2008 U.S. App. LEXIS 11309, *2 (2d Cir. May 27, 2008); *Enwonwu v. Fulton-DeKalb Hosp. Auth.*, No. 07-13498, 2008 U.S. App. LEXIS 10372, *7 (11th Cir. May 12, 2008); *Abromitis v. Cont'l Cas. Co./CNA Ins. Co.*, 114 Fed. Appx. 57, 61; No. 03-2425, 2004 U.S. App. LEXIS 23310, *8 (4th Cir. Nov. 5, 2004); *Aziz v. Groose*, No. 95-2496, 1996 U.S. App. LEXIS 402, *6 (8th Cir. Jan. 12, 1996); *Kessee v. Oklahoma*, No. 94-6291, 1995 U.S. App. LEXIS 9948, *4 (10th Cir. May 2, 1995).

2. *The Fifth Circuit properly held that the District Court did not abuse its discretion.*

The Fifth Circuit, in its review of the District Court's rulings on the discovery motions (Petitioner's

Motion to Compel and Respondent's Motion for Protective Order) that the Petitioner asks this Court to review, properly found that the District Court did not abuse its discretion.

Petitioner merely argues that had the District Court granted his Motion to Compel and denied Respondent's Motion for Protective Order, the substantive outcome below would have been different. However, this does not impact Petitioner's claim here. The undisputed facts are that Petitioner sought depositions of elected District officials (with one day's notice) four days before the close of discovery. He then filed a Motion to Compel further discovery from Respondent literally on the eve of the discovery deadline. The District Court denied Petitioner's Motion to Compel and granted Respondent's Motion for Protective Order based upon the unreasonableness of these requests.[2]

The Fifth Circuit specifically held that Petitioner's arguments were without any merit for several reasons. First, the District Court expressly found that Respondent's previous discovery responses were reasonable and complete. The District Court held that the entry of a protective order due to impending

---

[2] Petitioner erroneously asserts that Northern District of Texas "Local Rule 16.1(f) exempts *pro se* cases fro [*sic*] the scheduling and case management procedures of Rule 16(b)" of the Federal Rules of Civil Procedure. (*See* Petition, p. 11.) N.D. TEX. L.R. 16.1(f) provides that *pro se* plaintiff cases are exempt from the scheduling and planning requirements of FED. R. CIV. P. 16(b). However, FED. R. CIV. P. 16(b) exempts *pro se* plaintiffs only from appearing at scheduling conferences or having to consult with the district or magistrate judge regarding the scheduling order. *Id.* It does ***not*** exempt the *pro se* plaintiff from complying with the scheduling order once issued by the district or magistrate judge. *See id.*

discovery deadlines is not an abuse of discretion. *See Turnage v. Gen. Elec. Co.*, 953 F.2d 206, 209 (5th Cir. 1992).

Other circuit courts agree with the Fifth Circuit's review of the District Court's rulings on the discovery motions. The Second Circuit has held that "the management of discovery lies within the sound discretion of the district court, and the court's rulings on discovery will not be overturned on appeal without abuse of discretion." *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 561 (2d Cir. 1997). The Sixth and Ninth Circuits follow the rule that district courts have wide discretion to conclude discovery. *See, e.g., Audi AG v. D'Amato*, 469 F.3d 534, 541-42 (6th Cir. 2006); *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir. 1986). As in this case, the Second Circuit has held that the denial of discovery requests propounded by a recalcitrant litigant on the eve of the discovery deadline is not an abuse of discretion. *See Shaheen v. Naughton*, 222 Fed. Appx. 11; No. 05-6556-CV, 2007 U.S. App. LEXIS 3978 at *2 (2d Cir. Feb. 21, 2007).

Thus, the argument that any further discovery responses from Respondent would have changed the outcome is an unfounded and irrelevant conclusion, and the District Court below was well within its discretion to make the discovery rulings that it did. Petitioner does not provide this Court with any compelling reason why Petition should be granted on the District Court's discovery rulings. Petitioner likewise fails to point to any opinions of this Court or another court of appeals which conflict with the decision of the Fifth Circuit in this case. The Fifth Circuit correctly applied the abuse of discretion standard to the District Court's rulings, and Petitioner provides this Court with absolutely no compelling reason why the Petition should be granted.

C. The District Court properly denied Petitioner's Motion to Vacate.

1. *The denial of Petitioner's Motion to Vacate is reviewed for abuse of discretion.*

The denial of a motion to vacate pursuant to FED. R. CIV. P. 59(e) is also reviewed for abuse of discretion. *Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir. 1994); *see, e.g., Schwartz v. Emhart Glass Machinery, Inc.*, 235 Fed. Appx. 503; No. 07-55281, 2007 U.S. App. LEXIS 18355, *1-2 (9th Cir. July 27, 2007) (holding that orders denying or granting motion to vacate are reviewed for abuse of discretion) (citing *Casey v. Albertson's, Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004)). Here, the District Court did not review the additional materials Petitioner submitted with his Motion to Vacate because they were not "newly discovered" as required by Rule 59(e), as they were fully available evidence at the time of summary judgment (including Petitioner's own declaration).

2. *Petitioner provides no basis for reconsideration.*

Petitioner fails to provide any reasons as to why he believes the District Court abused its discretion in denying Petitioner's Motion to Vacate. Petitioner argues only that the judgment should be vacated because Petitioner's failure to file a response to Respondent's Motion for Summary Judgment was caused by:

- improperly imposed scheduling orders;
- Defendants' refusal to meet their discovery obligations;

- erroneous rulings on discovery motions; and
- excusable neglect due to the inability of Grey's attorney to prepare the case in the available time.

None of these arguments are supported by any evidence or the record itself.

Indeed, the Fifth Circuit *in this case* held that Rule 59(e) motions to vacate or amend a judgment "must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *See* Appendix B, p. 25a. None of the reasons offered by Petitioner establish any manifest error of law or fact. Moreover, the District Court specifically found that the evidence attached by Petitioner to his Motion to Vacate was available at time the Motion for Summary Judgment was pending, and therefore should have been a part of a timely-made response to the summary judgment. Thusly, it did not constitute "newly discovered evidence."

The Fifth Circuit's opinion is completely consistent with the standards governing a motion to vacate in other circuit courts. For example, in *Kafele v. Lerner, Sampson, Rothfuss, L.P.A.*, 161 Fed. Appx. 487; No. 04-3659, 2005 U.S. App. LEXIS 28680 (6th Cir. Dec. 22, 2005), the Sixth Circuit, in agreement with the Ninth Circuit, affirmed the district court's denial of a motion to vacate because there was not "previously unavailable evidence, clear error of law, or manifest injustice." *Id.* at *10. (citing *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). Petitioner fails to guide this Court to a single decision of this Court or another court of appeals to the contrary. Accordingly, this Petition should be denied.

CONCLUSION

None of the questions raised by this matter present any compelling reasons to grant the Petition. Petitioner fails to present any compelling reason for this Court to review the Fifth Circuit's decision affirming the District Court's granting of Respondent's Motion for Summary Judgment. Petitioner likewise fails to give any compelling reason for this Court to review the Fifth Circuit's decision affirming the District Court's rulings on the discovery motions. Finally, Petitioner does not present any compelling reason for this Court to review the Fifth Circuit's decision affirming the District Court's denial of Petitioner's Motion to Vacate. For the foregoing reasons, Respondent prays that this Honorable Court decline to issue a writ of certiorari in the instant matter.

Respectfully submitted,

ERIC V. MOYÉ *
VINCENT | MOYÉ, P.C.
2001 Bryan Street
Suite 2000
Dallas, Texas 75201
(214) 979-7400

* Counsel of Record

Counsel for Respondents

Of Counsel:

DAWN KAHLE DOHERTY
EUNICE E. KIM
VINCENT | MOYÉ, P.C.
2001 Bryan Street
Suite 2000
Dallas, Texas 75201
(214) 979-7400

Of Counsel for Respondent Manuel Vasquez:

TODD R. HIXON
HAAKON T. DONNELLY
BELLINGER & DEWOLF, L.L.P.
10,000 N. Central Expressway,
Suite 900
Dallas, Texas 75231
(214) 954-9540